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Toward a European Constitutional Language? Book review.

(András Jakab: European Constitutional Language. Cambridge University Press, 2016, 530p.)

Toward a European Constitutional Language?

The book by András Jakab makes an intriguing read for lawyers, political scientists and above all constitutional scholars. The author endeavors to acquaint the reader with the literature concerning the issues raised in the book in the theoretical premises of a specific scientific field and, referring to the title of the book, the European constitutional language. Although a recapitulative work is promised in the introduction, the author takes a strong line arguing alternatively for or against the theories to be found in the extensive constitutional law literature analyzed. He views the objective of constitutional theory as proposing a language for constitutional law discourse so as to be able to raise societal challenges to its level.

These endeavors are difficult, especially in light of the fact that it is not difficult to express pessimistic views concerning an overall Europe-wide constitutional theory.

To give an example, Raz draws attention to such difficulty in his study written on the authority and interpretation of constitutions. He takes a rather pessimistic tone in stating that unfortunately there are very few useful general theories directed at the interpretation of constitutions. The reason for this lies in elaborating such theories on the grounds of a given national constitution based on a specific legal system, the general applicability of which is virtually impossible.[1] Jakab, however, purports to express his view on European constitutional theory and thereby provide a certain summary of relevant constitutional literature. Therefore, the author deliberately circumvents Raz's trap mentioned above because he indicates a clear choice, namely that a European constitution does exist. In his book he categorically states that the basic documents of the EU satisfy the criteria for a constitution.

What might strike the reader at first glance is that the author handles sources of legal theory well in comparison with more general and typical constitutional law papers, which alludes to a promising endeavor. On the other hand, he underscores his objective of not writing about constitutional legal theory. The author intends to raise theoretical issues of constitutional law onto a level higher than legal theory to analyze them in a more specific, contextualized and, if you will, more "lawyerly" form. Those interested in constitutional theory might be intrigued by the fact that the author represents a legal system that has sparked constitutional debate on the international scene in recent years. They might also be interested that the author himself has laid down a constitutional concept that diverges from governmental intentions. Therefore, we have a researcher who does not only possess practical knowledge in the interpretation of the

[1] Joseph RAZ: *Between Authority and Interpretation: On the Theory of Law and Practical Reason*, Oxford University Press, Oxford, 2009.

constitution, but also its framing process even though nothing really has ever materialized from his vision.

If one takes a look at the book from a structural point of view, one can define three clear-cut sections. In Part I, a constitutional interpretation theory is outlined by Jakab who construes the constitution to be a specific case of legislative interpretation. With dynamic tricks, his aim is to help those applying the law make sense of abstract and unsophisticated texts in order for the sense thus unearthed to provide guidance for further application of the law.

The author points out at the beginning of the book that the grammar of the constitutional language is made up of rules inherent to constitutional reasoning. Therefore, he aims to establish the foundations of constitutional theory by introducing and criticizing some methods of interpretation. The book may also serve as a course book, in which the palette for interpretation based on comparative constitutional literature is presented by the author only to opt for a preferred method of interpretation in the end. (Jakab considers these methods of interpretation to be norms regardless of the fact that they are only present in legal tradition or legislation adopted.) The author regards teleological interpretation as the most appropriate, which enables the text of the constitution to adapt to changing social circumstances. Objective teleological interpretation is viewed by the author as a meta-method susceptible to reduce arbitrariness by application and, by extension, legal insecurity, while ensuring the flexibility of the constitution.

Perhaps the most interesting part for the reviewer encompasses a comparative analysis of European constitutional "dialects" or local instances of grammar, traditionally referred to as styles of reasoning. Following the presentation of paired-up German-Austrian, French-British and Hungarian-Spanish styles of reasoning, the author asks the question: Can one speak of a European style of constitutional reasoning? Do substantial differences exist between the styles of reasoning of European constitutional courts and those of courts vested with constitutional interpretation which may give rise to the emergence of an autonomous European style of reasoning? The author states that there are only shifts in emphasis while the elaboration of common constitutional law dogmatics and such a style of reasoning is urgently needed.

Part II reveals an interpretation and analysis of key constitutional concepts (sovereignty, rule of law, constitution, democracy and nation). The author lays down the premise that the semantic content of these concepts is shaped by responses to current social challenges. The responses are produced either randomly in an ad hoc manner or on purpose. According to Jakab, this purposeful production in the past has the potential of redefining the concepts in the present and their semantic content could be adjusted to prevailing social challenges.

The reader might be taken most aback by the proposed uses of the first concept. Concerning the concept of sovereignty, constitutional scholars' task would not lie in intentionally making the meaning of sovereignty more complex and vague, thus rendering it neutral with a view to conceal and reconcile two irreconcilable views dividing Europe today. Harmony between national sovereignty and European integration as two directly opposing narratives can be fostered this way.[2] The author somewhat contradicts himself at this point because he previously expounded his theory that constitutional scholars may be biased to the extent of having a political vision (p. 20). It stretches the imagination that a political vision would lack commitment to such a basic issue.

The author considers that rethinking or reinterpreting the rule of law concept, however, is not necessary even in circumstances overshadowed by the threat of terrorism, which is not an

[2] Jakab uses Maduro's "contrapunctual law" theory for this line of argument.

original thought, but the sturdiness of the standpoint is all the more likable. One should not discount or weaken the concept of the rule of law in the fight against terrorism when opening the floodgates of total governmental discretion.

Obviously, the most gripping question in the part discussing the true nature of the constitution is whether or not one can actually talk about a European constitution. Does the EU have a codified constitution in spite of failed efforts to adopt one? The author, using the criteria of his own notion for 'constitution',[3] responds in the affirmative. However, he sees the constitution not having a symbolic content as a discrepancy. Constitutional scholars may help provide a remedy for this discrepancy if they refer to the basic documents as a constitution and use the vocabulary elaborated for constitutions for the concepts contained in them. The idea of inviting constitutional legal academia to consistently wield such a vocabulary may seem to have been written in a voluntarist spirit. Nevertheless, the following question is of more poignant nature: Would this attitude be susceptible of redressing current European problems?

Analyzing the subject of democracy, the possibility of a European *demos* and popular sovereignty and the arguments developed in relation to this subject must be underscored in the first instance. Jakab sees the elimination of the democratic deficit and the development of a real European sense of community in the creation of a direct relationship between elections and the political responsibility of the EU government (that is, the Commission) as well as the formation of a real European party system.

The author examines the concept of nation to the greatest extent as the last one in the category of key concepts deemed by constitutional scholars to be of utmost importance. The extent of this analysis is no coincidence since the usage of the concept of nation has a particular topicality in current constitutional law discourse. Based on the discussion of different nation concepts, the author outlines opportunities for strengthening a European identity. To this end, he does not fail to draw attention to the constitutional scholars' task to rely on the European population as the European nation. However, Jakab himself has doubts about the possibility of creating EU national awareness.

In Part III which concludes the book, with an intention being slightly outrageous, the author analyzes the "analytical framework" and concepts of a constitutional law discourse, which in a certain sense, according to Jakab, are wholly redundant. The author points out that these notions and theories are usually there in current professional discourse out of habit; however, they present no real increments for constitutional law. Thus, Jakab regards state doctrine (*Staatslehre*) in this way which, following a lengthy analysis does not yield any practicable conceptual framework. Consequently, he does not recommend establishing a European constitutional discourse thereon. He approaches the theory of *Stufenbaulehre* or 'step structure doctrine' similarly, discarding it in its entirety, but views certain elements thereof as worthy of retention (such as method purity). As he puts it in a slightly provocative manner: "These elements are, however, only 'organs to be transplanted' from the dead body of the Pure Theory of Law, whose heart – the *Stufenbaulehre* – is no longer capable of keeping the body alive." Jakab thinks the concept of legal principles to be also superfluous, and he does not accept their difference from other norms. He only considers principles (or at least what is normally referred to as such) to be very important (or fundamental) rules. Finally, he is rather heavy-handed with the public law—private law divide as well. Regarding this, the author voices his view that the division is artificial; however, its use is justifiable. As Seidman wrote it in 1987: "few would

[3] „One or several legal documents which are more difficult to amend than 'ordinary' laws, and on which one can measure the validity of the 'ordinary' laws" (p. 16).

argue that the boundary between public and private is in any way natural".[4] Jakab does not belong to this group, but he regards the use of the division as sustainable along the lines of the following definition: "(1) public law comprises the affairs/rules that are traditionally regarded as belonging to public law; (2) in (new) cases of doubt, that is, where the former traditional interpretation does not help, the decisive factor should be that no individual should lack the access to the protection of rights (redress)." (p. 395)

András Jakab's book has taken more than ten years to be written in English (and later Hungarian as well). This work is a reflection on new scientific developments and the author's own standpoint, with changes the latter apparent from the pages herein reviewed. The sometimes polarized and jaundiced views thus taken should be appreciated against this background as the author has also been in debate with himself preparing this work. The long period during which the book was written can easily be noticed if editing mistakes or orthographical errors are sought by the attentive reader – to no avail. This fact does not only praises the author, but also the copy editors and obviously the publisher.

Despite the existence of a common European constitutional heritage pronounced many times by the judicial bodies of the European Union, those who do not believe and do not want to believe in the possibility of creating a common European constitutional law and constitutional language will also be interested to read the book. Apart from the ambitious intention, the author has written a comparative constitutional work which, beyond professional discourse, can be aptly used for education as well and informs public opinion about current trends and issues in European constitutional development.

[4] Seidman, Louis Michael: Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law. The Yale Law Journal Vol 96. No. 5 (April, 1987) p. 1006.